IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1092 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PANKAJBHAI H PATEL

Versus

KANTABEN SHRI KRUSHNA AGRAWAL

Appearance:

1. Civil Revision Application No. 1092 of 2002

MR MB GANDHI for Petitioner No. 1-3/4

MR DIPAK R DAVE for Respondent No. 1

CORAM : MR.JUSTICE K.A.PUJ

Date of decision: 22/11/2002

CAV JUDGEMENT

1. The present revision application is filed against the order passed by the ld. 2nd Jt. Civil Judge (SD) Ahmedabad on 19.9.2002 below an application ex. 156 in

Civil Suit No. 1/1975 and below an application exh. 1 being Review Application No. 1/2002.

2. The brief facts giving rise to the present revision application are stated as under:

3. That the respondent herein who is the ori. plaintiff in the suit, has filed a Special Civil Suit No. 1/1975 for specific performance of the contract. In the said suit, the land in question was an agriculture land and, therefore, the ld. judge has referred the issue about the legality of the contract of agriculture land to the Mamlatdar and ALT. The land in question was situated beyond 8 kms. and whether the purchaser was an agriculturist having land within the notified area of 8 kms., was the issue which has been decided and the notification of restricting rights within 8 kms. is no more in force.

4. It is further averred in the petition that during the pendency of the said suit an application ex. 154 was given on 6.3.2002 for bringing legal heirs of defendant no. 3- namely Pravinbhai on record. Thereafter, another defendant no. 4- namely Jayantibhai also expired and, therefore, the present respondent has filed an application for bringing the heirs of defendant no. 4 on record. The said application was exhibited at ex. 156 and it was filed on 3.6.2002. In the said application, the present respondent has made the statement that the defendant no. 4 expired on 14.2.2002 and on that footing, the ld. trial judge has passed an order on 19.3.2002 whereby the legal heirs of the defendant no. 4 were directed to be joined as defendants.

5. It is further averred in the petition that the present petitioners were not heard in the above matter and true facts were not brought on record by the present respondent. The present petitioners, therefore, filed a review application wherein it was pointed out that so far as the death of defendant no. 4 is concerned, an application at ex. 149 was filed intimating therein the death of the defendant no. 4 and it was also stated in the said application that Jayantibhai Haribhai expired on 19.11.1986 and the copy of the said application was also received by the advocate of the present respondent. It is further stated in the petition that inspite of these facts, the ld. trial judge granted application though there was no prayer for any condonation of delay and for setting aside the abatement. It is further stated that way back in the year 1986, the heirs were not brought on record of the case and order was passed below ex. 1 in

Special Civil Suit No. 1/75 to the effect that suit was abated. It was further stated that even then without granting the prayer for setting aside the abatement, the ld. trial judge straightway granted an application and when review application was filed, the same was also rejected and being aggrieved by these two orders, the present revision application is filed by the petitioners.

6. Heard Mr. MB Gandhi ld. advocate appearing for the petitioners and Mr DR Dave, who appears on caveat on behalf of respondent.

7. Mr. MB Gandhi ld. advocate appearing for the petitioners submitted that while passing the impugned order granting an application for bringing the legal heirs of the defendant no. 4 on record, the ld. trial judge has not uttered a single word about the condonation of delay or about setting aside the abatement and, hence, the impugned order is absolutely illegal, null and void and deserves to be quashed and set aside. Mr. Gandhi has further submitted that the ld. trial judge has not considered the relevant facts of the matter and though the proper intimation about the death of the defendant no. 4 was given to the respondent's advocate and though the said facts were disclosed in the application ex. 149, the ld. trial judge has observed that there was no intimation given to the present respondent about the death of the defendant no. 4. Mr. Gandhi has further submitted that in absence of any specific prayer for condonation of delay or in absence of an application for setting aside the abatement, the ld. trial judge is not right in granting an application for bringing the legal heirs on record. The impugned order, therefore, suffers from basic infirmity and it is not tenable in the eye of law. While granting such an application, the ld. trial judge has exceeded his jurisdiction and hence the impugned order requires interference by this Court while exercising the revisional jurisdiction under sec. 115 of CPC.

8. Mr. DR Dave ld. advocate appearing on caveat for the respondent on the other hand has strongly supported the order passed by the ld. trial judge. He has further submitted that while dealing with the review application, the ld. trial judge has correctly considered the facts on record as well as the application and provisions contained in O. 22, Rule-10-A of CPC. He has further invited the attention of this Court to the fact that the ld. trial judge has observed in the order that in the application below ex. 156, the present respondent has clearly mentioned that neither the

respondent nor his advocate were informed about the death of defendant no. 4. Even otherwise, as per the provisions contained in Order-22, Rule-10-A of CPC, whenever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it, and the Court shall thereupon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist. Here in the present case, the ld. trial judge has observed that no such notice was issued by the court after an information was supplied to the court about the death of defendant no. 4 in the year 1986. He has further submitted that the ld. trial judge has passed the impugned order in the interest of justice and it was specifically observed in the order that no prejudice was caused to the defendants in the suit by granting such application. He has further submitted that the ld. trial judge has not committed any jurisdictional error while passing impugned order and hence, this Court should not exercise its revisional jurisdiction under sec. 115 of CPC.

9. In support of his submission, Mr. Dave has relied on the several judgments of the Supreme Court. In the case of Manindra Land and Building Corporation Ltd. vs. Bhutnath Banerjee and Ors., reported in AIR 1964 SC 1336, an application under O. 22 R. 9(2) for setting aside abatement of suit was made beyond the prescribed period. The trial court held that the plaintiff was prevented by sufficient from continuing the suit allowed the application and set aside the abatement of the suit. In revision, the High Court disagreed with the Subordinate Judge and held that the plaintiff had entirely failed to make out any good cause for the delay. On this fact, it is held that the trial court had jurisdiction to determine whether there was sufficient cause for the plaintiff for not making the application for setting aside the abatement in time, and if so satisfied, to admit it, and the High Court fell in error in interfering with that finding of fact. It is further held that it is not open to the High Court to exercise revisional jurisdiction under sec. 115, to question the findings of fact recorded by a subordinate Court. Section 115 applies to cases involving questions of jurisdiction, i.e. questions regarding the irregular exercise or non-exercise of jurisdiction or the illegal assumption of jurisdiction by a court and is not directed against the conclusion of law or fact in which questions of jurisdiction are not involved.

10. Mr. Dave has further relied on the decision of

the Calcutta High Court in the case of Nurul Hoda and ors. vs. Amir Hasan & Anr., reported in AIR 1972 Calcutta 449, wherein it is held that a decision setting aside an abatement or refusing to set aside the abatement upon a particular view whether sufficient cause had been made out or not does not involve any question of jurisdiction. Under the law of limitation time has been provided for making an application for bringing the heirs of the deceased defendant on record and time again has been provided for setting aside of the abatement by the Court on sufficient cause being shown. If, in a particular case, a Court sets aside abatement it does not in any way affect any right accrued to the defendant by virtue of the law of limitation.

11. Mr. Dave has further relied on the decision of the Supreme Court in the case of Gangadhar & Anr. vs. Raj Kumar, reported in (1984)1 SCC 121, wherein it is held that Rule 10-A was introduced in order to avoid procedural justice scoring a march over substantial justice. The legislative intention of casting a burden on the Advocate of a party to give intimation of the death of the party represented by him and for this limited purpose to introduce a deeming fiction of the contract being kept subsisting between the Advocate and the deceased party was that the other party may not be taken unaware at the time of hearing of the appeal by springing surprise on it that the respondent is dead and appeal has abated. The Supreme court has, therefore, held that the High Court was in error in refusing to set aside the abatement.

12. Mr. Dave has further relied on the decision of the Supreme Court in the case of Ram Sumiran and ors. vs. D.D.C. and Ors., reported in AIR 1985 SC 606, wherein it is held that it is true that no steps were taken by the appellants for bringing the legal heirs of deceased respondent no. 5 on record for about 6 years even though according to respondent no. 4, the appellants knew about the death of respondent no. 5. But merely because no application was made by the appellants for bringing the legal representatives of the deceased respondent no. 5 on record, it does not think that in the circumstances of the present case that would be a valid ground for refusing to grant the application of the appellants for setting aside the abatement and bringing the legal representatives of the deceased respondent no. 5 on record because the appellants are admittedly from the rural area and in a country like ours where there is so much poverty, ignorance and illiteracy, it would not be fair to presume that everyone knows that

on death of a respondent, the legal representatives have to be brought on record within a certain time. The ends of justice require that the application for bringing the legal representatives of the deceased respondent no. 5 should have been granted.

13. Mr. Dave has further relied on the decision of the Supreme Court in the case of United Bank of India, vs. Smt. Kanan Bala Devi and Ors., reported in AIR 1987 SC 1510, wherein, the defendant, a bank customer had an overdraft account with bank. The "R" Branch of the bank instituted the suit against him for recovery of certain sum. The bank customer died during pendency of the suit. The widow of the defendant informed the "D" branch of the bank of the death of the defendant. The applications for impleading the legal representatives of the defendant and for setting aside abatement were made by a chamber Summons about 8 years after the death of the defendant. The delay in making application was attempted to be explained with the plea that the "R" Branch of the bank had no knowledge of the death of the defendant till the "D" branch was informed of the death. The High Court rejected the application on the plea that notice to one branch would be notice to other branches. On this fact, it is held by the Supreme Court that the rejection of the application for setting aside abatement and for condonation of delay was not proper as the fact that the "D" branch had knowledge of the death would not be sufficient to impute "R" branch with constructive notice. Notice to one branch of a bank is no notice to the other branches.

14. Mr. Dave has further relied on the decision of the Supreme Court in the case of Rama Ravalu Gavade vs. Sataba Gavadu Gavade (dead) through LRS. & Ors., reported in (1997)1 SCC 261, wherein it is held that in view of the fact that the appellant is an illiterate farmer, an appropriate steps should have been taken by the counsel for the appellant on proper advise. In view of the fact that the counsel has not properly advised the appellant to take necessary steps, the delay had occasioned. The High Court, therefore, was not right in refusing to condone the delay.

15. Mr. Dave has further relied on the decision of the Supreme Court in the case of State of M.P. vs. S.S. Akolkar, reported in (1996)2 SCC 568, wherein it is held that the considerations for condonation of delay under Section 5 of the Limitation Act and setting aside of the abatement under Order 22 are entirely distinct and different. The court always liberally considers the

latter, though in some cases, the court may refuse to condone the delay under Section 5 in filing the appeals. After the appeal has been filed and is pending, Government is not expected to keep watch whether the contesting respondent is alive or has passed away. After the matter was brought to the notice of the counsel for the State, steps were taken and after due verification belated application came to be filed. It is true that Section 5 of the Limitation Act would be applicable and delay is required to be explained. The delay in official business requires its broach and approach from public justice perspective. Under these circumstances, the delay is condoned. The abatement is set aside and legal representatives are brought on record.

16. Mr. Dave has lastly relied on the decision of the Supreme Court in the case of Ram Nath Sao alias Ram Nath Sahu & Ors. vs. Gobardhan Sao and Ors., reported in (2002)3 SCC 195, wherein it is held that the expression "sufficient cause" within the meaning of Section 5 of the Limitation Act, 1963 or Order 22 Rule 9 CPC or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependent upon facts of that case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. However, courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in overjubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal, an exception, more so when no negligence or inaction or want of bona fides can be imputed to the defaulting party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine-like manner. However, by taking a pedantic and hypertechnical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates, either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way. The

Supreme Court, therefore, ultimately held that the Division Bench of High Court was not justified in upholding the order passed by the ld. Single Judge, whereby the prayers for condonation of delay and setting aside abatement were refused and accordingly the delay in filing the petition for setting aside the abatement was condoned, abatement was set aside and prayer for substitution was granted.

17. I have considered the arguments canvassed by the ld. advocates appearing on behalf of the respective parties. I have also gone through the order passed by the ld. trial judge and I have also considered the authorities cited before me. I am of the opinion that the ld. trial judge has not committed any jurisdictional error while passing the impugned order. It is true that the order dated 19.3.2002 granting application for bringing the legal heirs of deceased defendant no. 4 on record is not a reasoned order and no detailed discussions were found therein. However, the fact remains that the ld. trial judge has exercised his jurisdiction in the interest of justice and it was also rightly observed that it is necessary to bring the legal heirs of defendant no. 4 on record for deciding the suit on merits. Ld. trial judge has passed a detailed order while dealing with the review application preferred by the present petitioners. He has specifically observed that in the application ex. 156, the present respondent has prayed for condonation of delay in filing the application for bringing the legal heirs on record and for setting aside the abatement of the suit. Thus, the specific prayers are made in the application and having considered the facts of the case when such prayers were granted by the ld. trial judge, it cannot be said that the order suffers by any jurisdictional error. Ld. trial judge has also considered the provisions contained in Order 22, Rule 10-A of CPC and found that as a matter of fact no notice was issued by the Court after receipt of the information about the death of the deceased defendant no. 4 in 1986.In this view of the matter, the delay condonation application was rightly entertained and abatement was also rightly set aside by the ld. trial judge while granting application for bringing heirs of the defendant no. 4 on record. In the light of the authorities cited by Mr. Dave, it is difficult to accept the contention raised by Mr. Gandhi that the order passed by the ld. trial judge suffers from any jurisdictional error and it requires an interference by this Court while exercising revisional jurisdiction under sec. 115 of CPC. I am, therefore of the view that there is no substance in the present civil revision application

and hence, it is accordingly rejected. Notice discharged with no order as to costs.

(K.A. PUJ, J.)

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